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No. 1051

In the

# Supreme Court of the United States

OCTOBER TERM, 1966

UNION CARBIDE CORPORATION,

*Petitioner,*

*vs.*

E. I. du PONT de NEMOURS and COMPANY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SIDNEY NEUMAN,
ROBERT L. AUSTIN,
77 W. Washington St.
Chicago, Illinois 60602
*Attorneys for Petitioner.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner, Union Carbide Corporation, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 369 F.2d 242 and is printed in the Appendix hereto, *infra*, p. 1a.

The opinion of the District Court for the Northern District of Illinois is reported at 250 F. Supp. 816 and is printed in the Appendix, *infra*, p. 9a.

The opinion of the District Court for the Southern District of Illinois in the companion case is reported at 238 F. Supp. 540. The post-judgment order entered in the Southern District is not reported but is printed in the Appendix, *infra*, p. 17a.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1966, and became final on January 6, 1967, upon denial of a timely petition for rehearing. The mandate of the Court of Appeals has been stayed to February 11, 1967, to permit the filing of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Is the time ripe for this Court to establish the guidelines for application of the doctrine of collateral estoppel by judgment, or shall the exceptions and technical refinements continue to proliferate so that parties may relitigate issues to the limits of their ingenuity in shifting forums and rephrasing causes of action?

2. Where, after prevailing in an interference, a patentee circumvented public use proceedings in the United States Patent Office and obtained his patent by claiming the benefit of an application filed within a year of the public use, and where a United States District Court in subsequent review proceedings under 35 U.S.C. § 146 confirmed the priority of the patentee but found that the method disclosed in the said application was "unworkable," and where the patent owner after an unsuccessful attempt by post-judgment proceedings to vacate this adverse finding acquiesced therein by failing to take an

appeal, does not the doctrine of collateral estoppel by judgment apply to the specific fact finding of unworkability in a subsequent infringement suit between the same parties?

3. What should be the place of the so-called "rule of essentiality to the judgment" in the doctrine of collateral estoppel?

(Does the rule mean that a judicial finding was "essential", and therefore binding between the parties, if it was actually presented, litigated and decided in the prior case [*e.g., Railroad Companies* v. *Schutte,* 103 U.S. 118, 143 (1880)], or does it mean that only "necessary" or "foreseeably important" or "ultimate" findings are binding?)

4. Does a court's deliberate finding of fact in the context of a credibility issue lose all effect when the identical fact question arises between the same parties before a subsequent court in the context of a patent validity issue?

(Is *Becher* v. *Contoure Labs.,* 279 U.S. 388 [1929], still good law, or shall this Court permit the abolition of collateral estoppel in patent cases?)

5. Is the doctrine of collateral estoppel inoperative as to a specific finding of fact merely because in the previous litigation between the parties the finding was not re-examined by a court of review?

(Should the federal courts follow this Court's decisions in, *e.g., Johnson Co.* v. *Wharton,* 152 U.S. 252 [1894], and *United States* v. *Munsingwear,* 340 U.S. 36 [1950], or should they follow the contrary view in the Restatement of Judgments, § 69(2), comment c?)

## STATUTES INVOLVED

35 United States Code, § 102.

"A person shall be entitled to a patent unless—

"(b) the invention was . . . in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States. . . ."

35 United States Code, § 112.

"The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention."

35 United States Code, § 120.

"An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States by the same inventor shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application or on an application similarly entitled to the benefit of the filing date of the first application and if it contains or is amended to contain a specific reference to the earlier filed application."

## STATEMENT OF THE CASE

Petitioner was sued by respondent in 1965 in the United States District Court for the Northern District of Illinois for alleged infringement of three patents. The basis for

federal jurisdiction of the suit in the first instance was 28 U.S.C. § 1338(a).

The District Court held one of the patents, the "Traver" patent, invalid on the basis of a finding of fact made in the decision of a prior suit where the same parties had contested priority of inventorship as to certain subject matter of that patent (*infra,* p. 16a). The Court of Appeals reversed and held that the respondent patent owner could relitigate the fact question in the infringement case even though the same question had been fully submitted and twice carefully decided against respondent in the earlier inventorship case (*infra,* p. 1a).

The controversy between these parties over the Traver patent started in 1953 with the declaration of an interference in the Patent Office between Traver and rival inventors, including Adams and Wakefield, petitioner's applicants (R. p. 189).* Although Traver was awarded priority by the Board of Patent Interferences, the Board also found that the invention had been used commercially by Traver in March 1950 and that an application filed by him in October 1950 neither expressly nor inherently disclosed the invention. (R. pp. 64-66) This signalled the beginning of strenuous efforts by Traver, and later respondent, to change or avoid these crucial findings since any patent issued on Traver's 1953 application involved in the interference would obviously be invalid in view of the 1950 public use.

Traver unsuccessfully petitioned the Board three times to change its ruling as to the disclosure of the 1950 application (R. pp. 233-4). Traver next requested the Commissioner of Patents to overrule the Board, but again

* "R. p." designates the printed Appendix on appeal in the certified record from the Court below.

without success (R. p. 231). Public use proceedings were then initiated but sidestepped by Traver (R. pp. 204, 212, 218, 223). He gave up the claims which he won in the interference and requested some newly rewritten ones, claiming the benefit and filing date of his 1950 application for the avowed purpose of eliminating "all question of a prior use bar" (R. pp. 181-8). Acting *ex parte,* Traver persuaded an Acting Examiner to allow the rewritten claims (R. p. 222) and the patent issued.

When the *inter partes* priority contest was resumed in civil review proceedings under 35 U.S.C. § 146 in the United States District Court for the Southern District of Illinois, that court (the Honorable Frederick O. Mercer) agreed with the Patent Office Board that Traver was the first inventor, and that Traver's 1950 application did not disclose the invention, specifically finding that it described an unworkable method (238 F. Supp. 544). Because of the limitations of his jurisdiction (R. p. 171, 238 F. Supp. 546), Judge Mercer could not and did not declare the Traver patent invalid because of the 1950 commercial use. However, respondent recognized that the unworkability finding effectively invalidated its patent and petitioned Judge Mercer to change or withdraw it from his opinion (R. p. 142). This move was again vigorously opposed by petitioner (R. p. 145). After full resubmission of the matter, Judge Mercer refused to change his mind, ruling from the expert testimony and demonstrations in open court that the evidence was "incontestable" and that there was "no error" in the finding (*infra,* p. 17a). Respondent acquiesced in the post-judgment decision. It did not ask for a rehearing and made no effort to reopen the proofs or to appeal. Instead, respondent very shortly thereafter instituted this action in another forum.

Upon the filing of the instant case, petitioner immediately moved for summary judgment on the basis of Judge Mercer's findings (R. p. 6). The District Court, the Honorable Abraham L. Marovitz, granted the motion, holding that under the doctrine of collateral estoppel by judgment, respondent was not entitled to relitigate with petitioner the material facts on which the motion was based (*infra,* p. 10a). Judge Marovitz, accepting Judge Mercer's finding of unworkability, decided that Traver's 1950 application was not effective because an unworkable disclosure does not meet the requirement in 35 U.S.C. § 112 for a full description of the invention (*infra,* p. 14a). He therefore concluded that the patent was invalid under 35 U.S.C. § 102(b) because of the public use more than one year before an effective application was filed (*infra,* p. 16a).

The Court of Appeals reversed because it disagreed with the application of the doctrine of collateral estoppel by the District Court (*infra,* p. 8a). The Court of Appeals admitted that Judge Mercer had made the unworkability finding but seemed to think that it related only to a credibility issue, that it was not "essential", and that the estoppel effect of Judge Mercer's decision should be determined solely by what was in his judgment (*infra,* pp. 7a-8a). The Court's opinion refuses to acknowledge the difference between res judicata and collateral estoppel by failing to recognize the clear distinction between validity of a patent as a conclusion of law and the findings of fact from which this conclusion is drawn.

## REASONS FOR GRANTING THE WRIT

The single fact question involved in this case has been contested seven times between these parties, and seven times it has been decided against respondent—first in

the administrative proceedings of the Patent Office and then in the courts, as explained above. But the decision of the Court of Appeals permits respondent to ignore the prior rulings and to try this stale question again in a new forum under the heading of a new cause of action. In such redundant litigation, the mischief done to the orderly administration of the law is manifest.

How did the Court of Appeals come to sanction this procedure? Because the Court failed, like other courts before it, to make sense out of the doctrine of collateral estoppel. The law in the federal courts on the subject has become murky, confused and contradictory. Requirements, exceptions, qualifications and corollaries abound in the authorities. Generations of judges and legions of lawyers and commentators have taken a fairly simple and exceedingly sensible rule and, by relentless march of elliptical rhetoric, have rendered it nearly useless.

The questions raised in this petition are therefore of public and economic importance. Under the decision of the Court of Appeals, petitioner must now defend a patent infringement action which will be both protracted and expensive, and which would be unnecessary if collateral estoppel were applied. The history of this case should persuade this Court to settle the guidelines for application of the doctrine of collateral estoppel to all such cases. This would do much to relieve congestion in the trial courts, reduce the cost of patent cases, and promote their prompt disposition—the *desiderata* of a truly just patent system.

### 1. The Doctrine of Collateral Estoppel by Judgment, As It Was and Ought To Be.

This Court has said that, "The peace and order of society demand that matters distinctly put in issue and

determined by a court of competent jurisdiction as to parties and subject-matter, shall not be retried between the same parties" and that this is a general rule "deeply imbedded in the jurisprudence of all civilized countries." *Johnson Co.* v. *Wharton,* 152 U.S. 252, 257, 260 (1894). "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll* v. *Gottlieb,* 305 U.S. 165, 172 (1938).

An early statement of the rule by this Court was that the estoppel of a judgment "extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined in the course of the proceedings." *Aurora City* v. *West,* 74 U.S. (7 Wall.) 82, 103 (1868). The next authoritative statement by this Court came in *Cromwell* v. *County of Sac,* 94 U.S. 351, 352-3 (1876), where, in distinguishing the operation of res judicata in a second suit between the same parties upon the same claim from the collateral estoppel arising in a second suit between the same parties on a different claim, it was said that in the latter case "the inquiry must always be as to the point or question actually litigated and determined in the original action." It is upon the ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives a conclusive effect to the matters adjudicated in the prior case. *Reynolds* v. *Stockton,* 140 U.S. 254, 268 (1891). Whenever a question "fairly arises" at trial, and there has been a distinct decision of the question, the decision is binding. *Union Pacific Co.* v. *Mason City Co.,* 199 U.S. 160, 166 (1905). Otherwise stated, "a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action" even though the original determination was erroneous. *United States* v. *Moser,* 266 U.S. 236, 242 (1924).

**2. The So-called "Rule of Essentiality," Its Evolution and Misapplication.**

It is axiomatic that an estoppel will not be found if it must be guessed at. The rule of essentiality in the doctrine of collateral estoppel was therefore devised to fit the case of a general judgment or jury verdict. This Court phrased the rule as follows in *Fayerweather* v. *Ritch,* 195 U.S. 276, 302 (1904):

> "The ordinary rule in respect to a judgment without any special findings is that it, like a general verdict of a jury, is tantamount to a finding in favor of the successful party of all the facts *necessary* to sustain the judgment."*

More recently, in *Emich Motors* v. *General Motors,* 340 U.S. 558, 569 (1951):

> "In the case of a criminal conviction based on a jury verdict of guilty, issues which were *essential* to the verdict must be regarded as having been determined by the judgment. . . . Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based."

This requirement for certainty, expressed as a rule of law, made good sense in the context in which it was intended to operate. Obviously a general verdict does not explain what determinations the jury made in reaching its decision and so it would not be fair or logical to hold a party bound as to any fact question tried before the jury unless a finding on that question was "essential" to the verdict, *i.e.,* unless the fact must "necessarily"

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* Emphasis added in quoted matter unless otherwise indicated.

have been found in order for the jury to render its verdict.

Unfortunately, somewhere in the distant evolution of the rule, it began to be thoughtlessly applied not only to general jury verdicts but to every kind of case. The result has been to gradually cut down the doctrine of collateral estoppel so that it can have only a very narrow effect. The Restatement, for example, limits binding or "essential" findings of fact to those upon which the judgment was "dependent" (Restatement, Judgments § 68, comment o at 309, 1942), and the Court of Appeals in this case seems to have followed the same criterion (*infra*, p. 6a). This view would mean that a party can never be bound by a finding of fact against him where the ultimate judgment was in his favor. It would mean that no matter how long the trial, no matter how thoroughly the evidence be presented and sifted, and no matter how carefully a judge might make his findings of fact, if the case should go off on a narrow point of law, the winning party may relitigate without limit any question of fact decided against him.

This narrowly restricted view of the doctrine of collateral estoppel is squarely in conflict with this Court's ruling in *Railroad Companies* v. *Schutte*, 103 U.S. 118, 143 (1880):

> "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

The Restatement view is, furthermore, in conflict with the decision of this Court upon which it is supposed to have been based. In *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242 (1939), the trial court had entered a decree adjudging a patent claim valid but dismissing the bill for failure to prove infringement. This Court said that the holding of validity, although immaterial to disposition of the case, stood "as an adjudication of one of the issues litigated." Surely this Court must have meant that the holding of validity, if not deleted, would have been binding as an estoppel. Yet we find the very same Second Circuit bench which this Court reversed in *Electrical Fittings* saying in a later case that this Court had held that the finding of validity was not an estoppel. *Harries* v. *Air King Products Co.*, 183 F.2d 158, 161 (1950). And it was the *Harries* decision by Judge Learned Hand that the Seventh Circuit Court of Appeals chose to follow in the present case (*infra*, p. 7a) instead of obeying the line of authority based upon this Court's ruling in *Railroad Companies, supra.*

The Court below also quoted from *Yates* v. *United States*, 354 U.S. 298, 336 (1957). In *Yates*, this Court cited Judge Hand's opinion in *The Evergreens* v. *Nunan*, 141 F.2d 927 (2 Cir. 1944), for the proposition that collateral estoppel applied to "ultimate" facts and not to evidentiary or "mediate" facts but, at the same time, this Court left open the question as to what circumstances might justify giving conclusive effect to evidentiary findings (354 U.S. 338).

What Judge Hand actually held in *The Evergreens* was that there are at least three possible approaches to deciding questions of collateral estoppel: The distinction between "mediate data" and "ultimate facts;" the

test of "necessary to the result" in the first case; and the test of foreseeability, *i.e.*, limiting the estoppel to "future controversies which could be thought reasonably in prospect when the first suit was tried" (141 F.2d at 928-9). Judge Hand seems to have chosen the "necessary to the result" test as most reliable, although not always fair, and he rejected foreseeability as an "impossible" criterion.

Paradoxically, Judge Hand's holding in *The Evergreens* has been more recently cited to support the foreseeability test that he rejected. In *Hyman* v. *Regenstein*, 258 F.2d 502, 510-511 (5 Cir. 1958), Judge Wisdom cited *The Evergreens* and "stated" its rule as follows:

> ". . . collateral estoppel by judgment is applicable only when it is evident from the pleadings and record that determination of the fact in question was necessary to the final judgment and it was *foreseeable* that the fact would be of importance in possible future litigation."

Even more paradoxically, the foreseeability test from the Fifth Circuit may have become the rule of today in the Second Circuit. In *United States* v. *Kramer*, 289 F.2d 909, 917 (2 Cir. 1961), the majority endorsed foreseeability, doubted whether it was ever intended to establish the "ultimate fact" criterion as a rigid rule, and limited *The Evergreens* to its peculiar set of facts. Curiously, the majority and dissent reached opposite conclusions while both relied upon this Court's decision in *Yates*.

In *Laughlin* v. *United States*, 344 F.2d 187 (D.C. Cir. 1965), Judge Wright rationalized the *Yates* decision as based on the foreseeability test (344 F.2d at 192, footnote 20). If Judge Wright is correct and *Yates* stands for

the foreseeability rule, the Seventh Circuit has obviously misunderstood and misapplied *Yates* since it is ridiculous to imagine that Judge Mercer was so blind that he could not foresee a patent infringement suit when he made the finding of fact against the patentee in the inventorship suit. If Judge Wright is wrong about *Yates,* then the Second and Eighth Circuits are also badly misled about collateral estoppel. These disagreements between Circuits and between Judges in the same Circuit as to the meaning of the decisions, including those of this Court, have become typical and they illustrate the widespread confusion and the need for this Court to definitively restate the doctrine of collateral estoppel.

### 3. A Finding of Fact Should Not Become Inoperative in a Later Case Between the Same Parties Merely Because the Jurisdiction or the Cause of Action is Different in the Later Case.

The Court of Appeals in this case reacted to the confusion as to collateral estoppel by the simple expedient of abolishing the doctrine for patent cases. The reasoning of the Court does so by completely obliterating the distinction between that doctrine and res judicata. Thus, the Court below said that Judge Mercer, in the earlier inventorship case, "did not intend to and did not deal with" issues relating to patent validity (*infra,* p. 8a), and it gave this as another reason why his finding was not an estoppel in the later infringement case.

Of course Judge Mercer did not rule on validity! He had no jurisdiction to make such a ruling (35 U.S.C. § 146, *Sanford* v. *Kepner,* 344 U.S. 13 [1952]). The Court of Appeals entirely missed this point and, in doing so, obviously implied that the finding in the first case would have been binding in the second only if the first court

had jurisdiction, like the second, to rule directly on the issue of validity. If that had been the case, the applicable rule would have been res judicata. And if "collateral estoppel" applies only in such a case, then that doctrine is no more—because it will have been merged into res judicata.

The Court of Appeals' reasoning that Judge Mercer "did not intend" to rule on validity is noteworthy also because it suggests still another judicial refinement, and one that will surely be impossible to apply. It suggests that subsequent courts, instead of looking to see what was actually tried and determined by an earlier court, must also become mind readers to find out what the earlier court "intended" should be the effect of its findings.

The decision of this Court in *Becher* v. *Contoure Labs.*, 279 U.S. 388 (1929), should have been controlling in this case; it has never been questioned in any court so far as we know; and yet it was resolutely ignored by the Court below.

The *Becher* case was a patent infringement suit brought by Becher in federal court. In a prior state court suit, Contoure and its assignor Oppenheimer had obtained a judgment that Becher was trustee ex maleficio for Oppenheimer of the patent and ordering that Becher assign the patent to Oppenheimer. The state court had found that Becher had appropriated Oppenheimer's invention in violation of a confidential relationship and had obtained issuance of the patent by falsely swearing that he, Becher, was the inventor.

In the infringement suit, Becher said that the state court had no jurisdiction to try the inventorship issue in the earlier suit since federal courts have exclusive

jurisdiction in patent cases, and therefore the state court holding that he had misappropriated the invention could not be given estoppel effect to invalidate the patent. This Court, speaking through Mr. Justice Holmes, disagreed and pointed out that Oppenheimer's state court suit was not to invalidate the patent but to obtain its assignment, and (pp. 391-2):

> ". . . even if the logical conclusion from the establishing of Oppenheimer's claim is that Becher's patent is void, that is not the effect of the judgment. Establishing a fact and giving a specific effect to it by judgment are quite distinct. . . .
>
> "That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void—and, although there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than to any other. A party may go into a suit estopped as to a vital fact by a covenant. We see no sufficient reason for denying that he may be equally estopped by a judgment."

The Court of Appeals in this case refused to honor Judge Mercer's finding as to Traver's 1950 patent application by saying that the finding related only to the issue of the credibility of Traver's witnesses and not to the validity of his patent. Under the *Becher* decision, that finding of fact under the issue of credibility did not evaporate when the identical fact question was presented to another court under the issue of validity. If the Court of Appeals were right, there would be nothing left of the doctrine of collateral estoppel and almost no limit to the

number of times a party could relitigate fact issues, so long as he keeps changing forums and forms of action.

**4. The Collateral Estoppel Effect of a Judgment Should Not Depend upon Whether it Has Been Re-examined by a Court of Review.**

This Court has said that the inquiry as to the conclusiveness of a judgment in a prior suit between the same parties can only be whether the prior court had jurisdiction and whether the question, sought to be raised in the subsequent suit, "was covered by the pleadings and actually determined in the former suit." *Johnson Co.* v. *Wharton,* 152 U.S. 252, 261 (1894). At the same time, this Court said (*ibid.*):

> "The existence or non-existence of a right, in either party, to have the judgment in the prior suit re-examined, upon appeal or writ of error, cannot, in any case, control this inquiry."

In the present case, the Court of Appeals thought that respondent could not have had appellate review of the finding of fact in question and apparently felt that this was another reason precluding application of collateral estoppel (*infra,* pp. 7a-8a). The Court of Appeals' view is supported by *Electrical Fittings Corp.* v. *Thomas & Betts Co.,* 307 U.S. 241, 242 (1939), and in § 69(2) of the Restatement of Judgments, but that section was specifically repudiated by this Court in *United States* v. *Munsingwear,* 340 U.S. 36, 39 (1950), and this Court has more recently held that a winning party can appeal from adverse findings, *Partmar Corp.* v. *Paramount Pictures Theatres Corp.,* 347 U.S. 89, 99 (1954). In any event, the Court of Appeals' view herein is not only contrary to the later decisions of this Court, it also has no basis in fact since respondent could have had appellate review.

After the original adverse finding and after denial of its post-judgment motion to change the finding, a number of procedures were open to respondent. It could have appealed the denial of its motion; it could have moved under Rule 52(b), Fed. R. Civ. P.; it could have moved under Rule 59(a) for a rehearing on any of the issues and to amend the findings or make new findings; or it could have moved under Rule 60(b) for relief. Denial of a Rule 59 motion is appealable, *Bros Inc.* v. *W. E. Grace Mfg. Co.*, 320 F.2d 594, 600-601 (5 Cir. 1963); and so is the denial of a Rule 60 motion, *Hines* v. *Seaboard Air Line R.R. Co.*, 341 F.2d 229, 231 (2 Cir. 1965).

Respondent, however, made no attempt to obtain appellate review of the adverse finding. This case, therefore, may be compared to *Munsingwear*, in which this Court discussed the failure of the United States to obtain appellate review and said (340 U.S. 41):

> "The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation."

## CONCLUSION

We bring only one case before this Court but we also bring an opportunity to make a decision affecting many more. Surely the courts of this country are sufficiently occupied with genuinely unresolved conflicts that they should not expend their resources in aid of repetitious trials like the present one. We submit that the season is overripe for this Court to make a simple clear statement reviving and reaffirming the doctrine of collateral estoppel.

The overriding consideration in every case should be whether a party has once had a full and fair hearing on the matter which it seeks to relitigate. All of the supposed requirements that a finding be "ultimate," "essential," "necessary," "foreseeable," "final" or "appealable" were originally intended only to promote the single purpose of safeguarding the right to a hearing, but they have been exalted and refined far beyond that purpose so that in the present case they have obscured altogether the salutary doctrine they were intended to aid.

Respectfully submitted,

SIDNEY NEUMAN,
ROBERT L. AUSTIN,
77 W. Washington St.
Chicago, Illinois 60602
*Attorneys for Petitioner.*

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